

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS (Boston)

3 No. 1:25-cv-10685-WGY

4
5 AMERICAN ASSOCIATION of UNIVERSITY PROFESSORS, et al,
6 Plaintiffs

7 vs.

8
9 MARCO RUBIO, in his official capacity as
10 Secretary of State, et al,
11 Defendants

12 *****

13
14 For Bench Trial Before:
15 Judge William G. Young

16
17 United States District Court
18 District of Massachusetts (Boston.)
19 One Courthouse Way
20 Boston, Massachusetts 02210
21 Monday, July 14, 2025

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23
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25 Official Court Reporter
United States District Court
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1 P R O C E E D I N G S

2 (Begins, 9:05 a.m.)

3 THE COURT: Good morning.

4 As I've authorized internet access to these
5 proceedings, let me say, as I've said each morning, if
6 you are observing these proceedings via the internet,
7 the rules of court remain in full force and effect, that
8 is to say there is no taping, streaming, rebroadcast,
9 screen shots, or other transcription of these
10 proceedings.

11 It's very important also that you keep your
12 microphone muted. If you do not, you'll be cut off.

13 With that said, we have one witness this morning,
14 which is the only trial time, and then we have matters
15 to discuss. But let's start with the witness and call
16 the witness.

17 MS. CONLON: Your Honor, um, as we previewed in
18 our e-mail to the Court, we would be and now have filed
19 a motion for additional time, because of course we
20 didn't expect a ruling by today, we made a very
21 difficult decision to not call -- and understanding that
22 we won't have the opportunity at a later time to call
23 Mr. Reger, whose testimony we frankly think is
24 important, but we need to be able to cross-examine the
25 government's witnesses with these documents with the

1 time that it takes. So we have -- we have withdrawn our
2 request to present testimony out of order and call
3 Mr. Reger.

4 THE COURT: I follow that. So the witness, Reger,
5 is not going to be called?

6 MS. CONLON: That's right.

7 THE COURT: Then we'll start then with the
8 discussion without -- trial time is not being recorded
9 now and I need your help really, and I have some
10 observations to make about further proceedings in light
11 of the stay, but before we do that, um, two --

12 Yes, Ms. Strokus, I simply want to offer an
13 apology for not getting your name right.

14 MS. STROKUS: No problem, your Honor.

15 THE COURT: No, in my mind it's a problem. By now
16 in the trial I should recognize your name and I have
17 mispronounced it and I apologize.

18 Thank you.

19 MS. STROKUS: Thank you, your Honor.

20 THE COURT: And, Mr. Kanellis, I was brusque at 1:00
21 only to -- it had nothing to do with the trial or the
22 mandamus proceedings, I had someplace to go. And as you
23 have said, and now I say, I'm apologizing for being
24 brusque.

25 But let's start with whatever it was you wanted to

1 say at 1:00 on Friday, and we'll go from there.

2 MR. KANELLIS: Thank you, your Honor.

3 I note that the Court has scheduled the post-trial
4 briefs to be due this Friday. Is my understanding
5 shared with your Honor?

6 THE COURT: I think that's correct.

7 MR. KANELLIS: Your Honor, I believe, and I
8 don't -- we've talked about it with the plaintiffs and
9 I'm not sure what their position is, I believe that all
10 parties would be benefitted if we were given a few extra
11 days to capture the final testimony that's going to be
12 presented on --

13 THE COURT: Actually I've had a chance to reflect
14 on these things as well. I'm not disposed to give --
15 let's start there. I'm not disposed to give the
16 plaintiffs any extra trial time. Of course I'm going to
17 devote all the time that we agreed to concluding the
18 trial, which until the stay, and this is not whining,
19 was going swimmingly.

20 So let's be clear. This is a case that involves,
21 among other things, motive and intent, and, um, since
22 I've had another of these cases that involve the
23 administration, um, and I thought it appropriate -- and
24 I absolutely thought it appropriate, that right after
25 final arguments I had various important things to say,

1 um, and then following it up with a written opinion.
2 The **Kennedy** case involving the National Institutes of
3 Health. But this case is not like that. Here's what I
4 expect to happen in this case.

5 In one part it's a, um, what I hope will happen
6 with respect to the trial. I hope that, with respect to
7 the trial, the stay will be lifted, and either I'll --
8 either lifted and I'll be allowed to muddle through to
9 the end of the trial or will be lifted with
10 instructions, which of course I will scrupulously
11 follow. But action will be taken promptly by the Court
12 of Appeals and I will get through the trial this month.

13 Now, um, this is a case in which I'm going to need
14 requests for findings and rulings and I've appreciated
15 the fact that you've ordered daily copy so that I have a
16 full transcript. So, um, there's going to be a period
17 of time, um, once the matter has been taken under
18 advisement and these post-trial filings have been
19 submitted to the Court before the Court -- and we
20 understand we're only in the first phase. The first
21 phase may be the last phase, the case may come to an end
22 after the Court's findings and rulings on the first
23 phase. And, um, contrary-wise the opposite result is
24 possible, that that may result in what we might call a
25 "finding of liability," and then the Court would have to

1 wrestle with the second phase, which is the issue of
2 redressability, the issue of a correction, if any is
3 possible.

4 So, um, what Mr. Kanellis -- if we start there, I
5 am, um, perfectly amenable to extending the time for
6 such filings because I have a lot of under-advisement
7 work to do. And, Mr. Kanellis, thank you.

8 So here I guess is -- what would be helpful to me,
9 now that I have the detailed privilege log -- I will say
10 in a font so small that I need a magnifying glass to
11 read it.

12 (Laughs.)

13 I want to talk with you, um -- well let's start
14 the talk like this, because it's a matter of interest to
15 me.

16 What, um -- on the plaintiffs' -- the plaintiffs
17 have rested but for certain witnesses, and that makes
18 perfect sense, and these witnesses include the cross-
19 examination of Armstrong, Watson, and who else?

20 MS. CONLON: As far as we know, that's it.

21 THE COURT: Well --

22 MS. CONLON: Oh, I'm sorry, I thought you were
23 asking me about whose cross-examinations were affected,
24 in our view, by the documents. Is that not the
25 question?

1 THE COURT: I agree that those two are affected by
2 the documents which have been disclosed to the
3 plaintiffs, those two.

4 MS. CONLON: Yes.

5 THE COURT: So if any event, the stay, however
6 construed, applies until the Court of Appeals permits me
7 to go forward, and that's perfectly fine. But now I'll
8 ask the broader question.

9 What else did you observe?

10 MS. CONLON: Yeah, I see. We reserved testimony
11 from our two witnesses who are traveling into the U.S.
12 to testify in this case who will both testify, time-
13 permitting on the 18th. And that's Veena Dubal, who is
14 the General Counsel to the AAUP, and Cinzia Arruzza, who
15 is a noncitizen member of the AAUP. And the person we
16 are not able to present, take testimony for, is Jeffrey
17 Reger, who is the Executive Director of MESA.

18 THE COURT: Yeah, understood.

19 MS. CONLON: Oh, I'm sorry, your Honor, my
20 colleague corrected me. We also anticipate -- we had
21 told your Honor that we -- rather than asking the
22 law-enforcement witnesses who are set to come tomorrow,
23 these four, um, ICE agents who are of a supervisory
24 level who the government intends to present, we also
25 want the chance to question them potentially more

1 broadly than the soap of their directs, which the
2 government I think has agreed to rather than asking that
3 we bring them back a second time. And so to the extent
4 that we need to go outside of their direct, I suppose
5 that's off the part of our case that remains.

6 THE COURT: Thank you, that's a helpful answer.
7 And again, just to move things along, as to those
8 witnesses, my custom is to allow you to go beyond the
9 direct. Of course the rule requires you to take them as
10 though -- on direct as though it is cross. But I've
11 allowed you to treat those witnesses as adverse because
12 they are employees of, um, one of the agencies where the
13 defendant public official is the top of that agency. So
14 there's the answer of what the plaintiffs are going to
15 do with the remainder of their time.

16 What else are we going to hear -- what witnesses,
17 beyond what has been mentioned, do the defendant public
18 officials want to present?

19 MS. CONLON: Your Honor, if I may correct myself
20 one more time, my smarter colleagues reminded me of
21 another point, which is that at least -- there's sort of
22 two components to this.

23 As I understand, we have now questioned one of the
24 agents who will be testifying tomorrow in a deposition
25 and there were many fights about privilege yet again,

1 um, relating to the scope of the law enforcement
2 privilege, as well as, I think, the deliberative process
3 privilege. So to the extent that the Court's guidance
4 to the parts on how those privileges apply or don't,
5 with the documents in front of the Court, I think that
6 will potentially affect -- in other words I anticipate
7 --

8 THE COURT: To make use of that.

9 MS. CONLON: Yes, exactly.

10 Unlike Mr.(s) Armstrong and Watson, these agents
11 are not, um, senders or receivers of the documents, the
12 affected documents, but we very well may have questions
13 for them based on those documents in terms of the
14 content. And so I don't -- I'm correcting my having
15 misspoken and saying, "Oh, the documents are totally
16 separate and apart from these agents," I should not have
17 made that representation. Just to complicate things a
18 little further to the Court.

19 THE COURT: No, no, that's very helpful. Very
20 helpful, and I thank you.

21 Mr. Kanellis, what are the defendants' public
22 officials going to present?

23 MR. KANELLIS: Your Honor, as indicated, tomorrow
24 we will present the four agents, as your Honor has
25 requested, who were at the sites of the arrest. On

1 Thursday, we have put aside time for, um, AD Armstrong
2 -- sorry, AD Watson with HSI to describe the HSI's role
3 in these, um -- in these, um, facts at issue.

4 THE COURT: Thank you.

5 MR. KANELLIS: We have -- we intend to present a
6 summary witness. It's not extensive, but some summary
7 exhibits through a summary witness. And then there's a
8 witness, you Honor, that falls outside the purview of
9 the Court's jurisdiction, that we will have briefly.
10 That witness is Brian Shuvea's deposition testimony
11 entered pursuant to 804(a) and (b) as an unavailable
12 witness. That is the extent of what we anticipate our
13 case to be.

14 THE COURT: The deposition testimony -- in other
15 words, he's not going to be a live witness, but you're
16 going to present his deposition?

17 MR. KANELLIS: Yes, your Honor, it will be very
18 brief, I just think it's significant, so it's important.

19 THE COURT: I'm sure you do.

20 So, um, that shouldn't take any time, because the,
21 um, plaintiffs, if you have portions that you think are
22 inadmissible, they can be indicated on the deposition
23 and I will read the transcript and make rulings, and my
24 rulings will decide what's part of the record or not.

25 All right, let's -- and I appreciate what you've

1 said, all of this makes sense. Let's talk then about,
2 um, what I call the core documents that the Court -- and
3 I don't -- well that's an appropriate phraseology.

4 I see the issues about the submission of documents
5 by the government to fall into three parts. The core
6 documents, by which I mean the documents which evidence
7 the procedures of the Department of Homeland Security
8 transmitting ROAs to the Department of State and the,
9 um, procedures that the Department of State followed in
10 acting on those documents. They started out as B
11 through K, which have been subject now to cross-
12 examination. And, um, they involve, um, without
13 characterizing them in -- or I think it's permissible at
14 least to identify them in light of the stay, Watson
15 letters and, um, also these decision procedures, the
16 "agree," "disagree," um, "discuss," forms that were used
17 to present matters to the Secretary of State, those have
18 been mentioned. And, um, in reviewing them -- and I
19 want to talk about them as a group. I consider them
20 core documents here. I note that certain of them have
21 attorney-written, um, data on the documents.

22 So not having reviewed the privilege log in
23 detail, um, but I think it's a good place to start, and
24 I think it will be helpful to the Court of Appeals to --
25 for the Court -- I can address this issue of waiver, and

1 I intend to, but -- which the Court specifically --
2 which the Court of Appeals specifically invited me to
3 speak, but I think it would be helpful for us to discuss
4 now where I have agreed to entertain the privilege log
5 and the claims of privilege with respect to the core
6 documents, and that's what I'd like to discuss. And
7 hopefully rule on. I'm familiar with these documents.
8 The ones that have been disclosed to the plaintiffs, the
9 plaintiffs are surely familiar with them. And defense
10 counsel is familiar with them.

11 So let me, um, identify first, as a place --
12 because it affects various aspects of what the Court's
13 duties are here, let's identify in the core documents
14 those written statements by attorneys.

15 Now as to those, I understand that the defense
16 raises the attorney-client privilege.

17 Is that correct?

18 MR. KANTER: Your Honor, I understand you to be
19 referring to the action memo with the -- you refer to
20 "agree," "disagree," "discuss." So I think we're
21 talking about the same sort of thing, there are some
22 handwritten notations --

23 THE COURT: Right.

24 MR. KANTER: -- which presumably Mr. Armstrong,
25 who -- this is his action memo.

1 THE COURT: No, I understand that.

2 MR. KANTER: They'll be able to clear that up, or
3 the meaning or significance of it. And what I
4 understand you to be asking is what is the nature of the
5 privilege --

6 THE COURT: But not as to Armstrong, he's not an
7 attorney. There is an attorney --

8 MR. KANTER: Yeah, there was attorney-client
9 privilege with regard to other e-mails in that core
10 subset.

11 THE COURT: That's what I'm talking about.

12 MR. KANTER: Yes, discussions of ICE officials
13 with their counsel.

14 THE COURT: Right.

15 MR. KANTER: And as your Honor knows, redactions
16 -- proposed redactions have been made with respect to
17 that attorney-client privilege. Obviously, um, CK
18 counsel is to be encouraged in the government. And, um,
19 this is a matter of some importance, um, I would say --
20 I would put it this way, on principle. Because as your
21 Honor also knows, the content -- I remember when you
22 were telling me, "Why" -- "This shows the government in
23 a good light, why would you not want to, in effect, just
24 voluntarily?" And our response was "That's of
25 course" --

1 THE COURT: So you were listening, and it does
2 show that.

3 MR. KANTER: That's for the client and the
4 attorney-client relationship to, you know, at a minimum
5 say, "I want to keep it privileged," right? And as a
6 result, we, um -- we are pursuing that privilege on
7 their behalf. And --

8 THE COURT: That's fair. That's fair. And I
9 understand it. I overrule it.

10 Now what other privilege applies? And I'll work
11 out from this with the implication. And I overrule it
12 on the ground that, um, you cannot give such data to
13 the -- the factfinder and then say, "Here it is, but
14 it's privileged, and therefore you can't consider it."
15 That -- and the basis is that is a knowing and
16 intelligent waiver of the privilege as to that data.
17 That's the ground that the Court's ruling.

18 Now are there other grounds to seek, um, a
19 privilege?

20 MR. KANTER: Over those e-mails?

21 THE COURT: Yes.

22 MR. KANTER: The proposed redactions reflect the
23 identities of the participants to those exchanges. Your
24 Honor's initial ruling was only e-mails and phone
25 numbers --

1 (Interruption.)

2 THE COURT: Okay.

3 MR. KANTER: Not identities, um, where the
4 government had proposed to redact, including the
5 identities, as law enforcement privileged. But
6 otherwise putting --

7 THE COURT: I guess I don't -- no, no, I hear you.
8 Why should the names of the people be redacted, they're
9 public officers of the United States?

10 MR. KANTER: The, um -- your Honor, it has to do
11 with the, um, the individuals and their responsibilities
12 and the nature of their responsibilities. There are
13 sometimes law enforcement interests that pertain to
14 identity that the government, um, seeks to maintain the
15 integrity -- for example, an analogy would be
16 maintaining the integrity of an investigation.

17 THE COURT: Well, of course. You see that I
18 understand. But, um, these are in-house people doing
19 their in-house work, um, I don't understand why their
20 names -- we ought not know who they are?

21 MR. KANTER: The contents of the communication,
22 um, absent an attorney-client privilege, reflect the
23 nature of the discussion. The agency, um -- and there
24 are limitations to what I would say in open court. Your
25 Honor has --

1 THE COURT: Well that's fine.

2 MR. KANTER: Okay.

3 THE COURT: And I -- I hear you, Mr. Kanter.

4 So again, I'm not disposed to redact the names,
5 absent some showing, um, which may -- an affidavit,
6 which may show the ongoing, um, concern that the
7 identity of a particular person, um, his or her name be
8 redacted. That may be filed under seal and I will
9 consider it.

10 Is there anything else?

11 MR. KANTER: Yes, there is one other matter that
12 your Honor enumerated, um, related to the action memos,
13 which, um -- the issue here is --

14 MR. ABDO: Your Honor, before you move on from
15 this --

16 MR. KANTER: May I finish my remark?

17 THE COURT: Yes, I will hear Mr. Kanter.

18 Mr. Abdo, I'll hear you in time.

19 Go ahead, Mr. Kanter.

20 MR. KANTER: I'll get right to the point.

21 THE COURT: Please.

22 MR. KANTER: The lead contention of my friend is
23 if you find that the action memos are not privileged
24 under the deliberative process privilege, then the
25 cross-examination of Mr. Armstrong and Mr. Watson may go

1 forward, that's their contention, and I would like to
2 address it.

3 THE COURT: Yes, and I agree. I agree that that
4 is a central issue here. And, um, let's -- but I want
5 to start out with the attorney's, the attorney advice
6 that's here in the e-mail.

7 I've overruled the -- I've overruled the assertion
8 of the attorney-client privilege because these were
9 voluntarily submitted to the adjudicator, on the basis
10 that that is a knowing and intelligent waiver. Now the
11 deliberative process privilege, in this Court's mind, is
12 something else again. And the analogy -- I think in
13 analogies too, and I was talking with the law clerk,
14 that if -- it isn't the same thing as the deliberative
15 process privilege, but courts hold certain things
16 absolutely privileged, and it's roughly the same, how
17 the Court comes to a decision.

18 So if, for instance, a civil case, like this is a
19 civil case, a motion for summary judgment, before it are
20 briefs and affidavits. None of those are in a
21 deliberative process privilege, though they are what the
22 parties have served up that will form the basis of the
23 Court's decision.

24 Then an attorney on the Court's staff takes an
25 affidavit, this happened more often in the covid days

1 when we were working remotely, and underlines, writes in
2 the margin, advice. We're not deliberating, we're not
3 in a meeting. There was that meeting, for instance,
4 that Hatch attended and I have sustained the
5 deliberative process privilege and allowed him to be
6 asked only what came out of the meeting, which was the
7 classic situation in my mind and easy to follow.

8 Here when an attorney does that, I think these
9 things fall within the deliberative process privilege.
10 I'm talking about the attorney. And indeed you've --
11 you've, um, anticipated it.

12 So it's conceptually, it's easy for me to think
13 about it with these attorney interlineations on e-mail.
14 That's my concern.

15 So let's say I sustain that because I think that
16 that is within the deliberative process privilege, that
17 is, that's the attorney advising, albeit remotely, the
18 decision-maker to make the decision, the actual policy,
19 what the Secretary of State decided, that's public, and
20 no one -- there's no objection as to that. So it falls
21 within the deliberative process privilege, it seems to
22 me.

23 We're in the middle of trial. And then we get to
24 the next problem. If I say, "No, that's within the
25 deliberative process privilege," candidly I've dealt --

1 in jury-waived cases, criminal cases, the stakes are
2 higher where matters were suppressed and I felt
3 perfectly comfortable in putting aside matters which
4 legally had to be suppressed. Perhaps not in every
5 case, but certainly in most cases. And making my
6 rulings on matters properly before me. But this is
7 different because we're in the middle of trial and these
8 have been disclosed to the plaintiffs.

9 So the truth is, as I always try to speak the
10 truth and be transparent, that as to the lawyer
11 interlineations, I could put those aside. I could
12 characterize them -- well I don't know that I have, and
13 I'll say no more. I can put those aside. But I'll say
14 this, well certainly some of the things that they said
15 are things that occurred to me before I read these
16 documents, that is, "Is this unprecedented?" "Are we
17 concerned about blow-back?" I need not go on. But
18 things which, um, you could readily argue are informed
19 by reading what lawyers, in their lawyer-like way were
20 saying, that both occur to the Court and I'm sure have
21 occurred to, um, plaintiffs.

22 So suppose, because I'm -- I think I'm prepared to
23 say, we can put those to one side, what the lawyers had
24 to say.

25 Now when -- because attorneys can fashion

1 questions that don't depend on it, you can't cross-
2 examine -- "Oh, but do you see here your own lawyer said
3 this and that?" We can exclude that. But are you
4 saying that I should curb their cross-examination to
5 questions that don't depend directly on, um, what the
6 lawyers had to say?

7 MR. KANTER: I --

8 THE COURT: You're following my --

9 MR. KANTER: I am following it, and I have -- I've
10 seen your Honor make these distinctions throughout this
11 trial frankly about many matters, admitting evidence,
12 for example, as limited, not for the content but for the
13 reaction, distinctions are made. This is a bench trial.
14 Your Honor is the judge and the jury, as it were. And,
15 um, those decisions and distinctions are yours to make.

16 I think the key, um -- the key aspect of this
17 process for the government, um, was the -- in handing
18 over the core documents to the plaintiffs, your Honor,
19 um, made a very important stipulation, the stipulation
20 was they were attorneys' eyes only, which I understood,
21 and your Honor can correct me if I am mistaken.

22 (Pause.)

23 THE COURT: Go ahead.

24 MR. KANTER: However I think your Honor was trying
25 to strike a balance, which is acknowledging either the

1 asserted privileges of the government or if the matter
2 of waiver is, um, pending before the First Circuit, or
3 there were other considerations related to attorney-
4 client or deliberative or law enforcement, your Honor
5 was striking a balance to enable the trial to proceed
6 and the examinations to proceed, attorneys'-eyes only.
7 And I think in asking me, "Can there be a robust cross-
8 examination based on these core documents?" I think the
9 government's answer is "Yes."

10 There may be matters which, for example, I had to
11 talk around in open court and matters for which a
12 sidebar was required, um, but what I'd like to
13 underscore is the plaintiffs have the documents, they
14 have all the documents. In fact, they have them
15 unredacted.

16 With respect to the, um, "agree," "disagree,"
17 "discuss" memos that your Honor, um, they not only have
18 those unredacted, they have the Secretary of State's
19 decisional memos unredacted. Why? Because we gave it
20 to them when we agreed to file it under seal with the
21 Court. The decision memos are, um, not, um, under seal
22 in full, there's a companion set that is public.

23 The plaintiffs have the information. They have
24 the ability to fashion questions. And if any of those
25 questions were to touch on areas of sensitivity, whether

1 the Court has ruled directly with respect to the
2 privilege or the government maintains their -- for
3 example, the other day when there was an exhibit, most
4 of which we had no objection to the questions based on
5 that exhibit, we never stood up and objected, but there
6 was one part of that one exhibit, and we brought it to
7 the Court's attention, and you acted immediately, and my
8 friends complied immediately. I think we were all on
9 the same page there. But the --

10 THE COURT: All right, that's very helpful,
11 Mr. Kantor, and I'm listening to you.

12 One last question before I hear Mr. Abdo, because
13 I -- you've -- I hear no suggestion in our discussion
14 that, um, while I said I could set aside the attorney
15 interlineations as, um, part of the deliberative
16 privilege, and I want to hear him on that, um -- and if
17 I decide to do that, I can do that, it does not affect
18 the integrity of my factfinding. No one suggests, when
19 I come to decide this case, because, as you have
20 characterized and I think accurately, these documents
21 cut both ways. I can't be more transparent. They do
22 cut both ways.

23 No one says -- on the government's side, no one
24 says I can't look at the documents, even if I excluded
25 the attorney data, the core documents, isn't that

1 correct?

2 MR. KANTER: Yes, that's absolutely correct.

3 THE COURT: Thank you.

4 MR. KANTER: And if I may? One last point or not.
5 I can sit down.

6 THE COURT: No, no, go ahead.

7 MR. KANTER: If the issue is -- what I'm saying is
8 the issue of whether it's deliberative or not is a
9 nonissue in terms of being able to question the witness
10 about it, work around it --

11 THE COURT: That's what I heard you say.

12 MR. KANTER: That's my main point.

13 As to whether it's deliberative? I do have an
14 argument that it is deliberative, even putting aside the
15 delineation, because this action memo is a proposed
16 decision.

17 THE COURT: Oh, you're talking about the
18 interlineations of Mr. Armstrong?

19 MR. KANTER: Mr. Armstrong's memo -- the whole
20 memo is a proposal to the Secretary of State. It's not
21 a decision, it's an offer recommending approval.

22 So "approve," right, can, like your Honor said,
23 things can be -- have two meanings at once.

24 THE COURT: Well that intrigues me. So we're
25 talking about these action memos now.

1 MR. KANTER: Yes.

2 THE COURT: In which there are interlineations by
3 Mr. Armstrong, the witness here at trial. We've all
4 seen them in their unredacted form. But you now make an
5 argument that the memo, because it has the
6 interlineations, is, um, part of the deliberative
7 privilege.

8 MR. KANTER: Yes, I do.

9 THE COURT: Yes, I understand.

10 MR. KANTER: And I think my friend helped me with
11 my argument for the following reason.

12 THE COURT: Well we'll let them make their own
13 arguments.

14 MR. KANTER: Okay, then I won't say that.

15 THE COURT: All right.

16 MR. KANTER: They made an argument that it's not
17 deliberative when it becomes final. Those are two
18 different things actually, but they make the critical
19 point that they're virtually identical in content,
20 right?

21 THE COURT: Yeah, let me. Let me hear their
22 argument from them.

23 MR. KANTER: Thank you, your Honor.

24 THE COURT: Mr. Abdo, we've talked about the
25 attorney -- the attorney statements and e-mails, we've

1 talked about these memos of -- we're pretty clear what
2 they are, that Mr. Armstrong gives to the Secretary of
3 State. Please address both.

4 MR. ABDO: Thank you, your Honor. And before I
5 address those, if I could just say one thing.

6 Last night, as you may know, we e-mailed
7 Ms. Belmont with a filing that we had hoped to file
8 under seal later today. We provided a copy to opposing
9 counsel. And if your Honor would like to have a copy of
10 it, I'd be happy to approach and provide it.

11 THE COURT: I have it, don't I?

12 MR. ABDO: Well I don't know if you have the
13 printout. But if you don't, I'm happy to provide you
14 one.

15 THE COURT: Oh, I have a printout.

16 MR. ABDO: Oh, okay. So let me just -- a few
17 points your Honor.

18 First, with respect to the attorney-client
19 privilege, we understand your Honor's ruling. We would
20 just encourage you to overrule the assertion of
21 privilege for the additional reason that, with the
22 exception of maybe one or two sentences in the e-mail
23 thread that we're talking about, nothing in that e-mail
24 thread is plausibly protected by that privilege. Most
25 of it concerns, um, decisions already made, not sought

1 -- you know not offered in the context of seeking legal
2 advice or received in that context.

3 The fact that attorneys happened to have been
4 copied on the e-mail is relevant, but it certainly isn't
5 dispositive to the assertions of privilege, and we'd ask
6 you to base your ruling on that additional basis, which
7 we think would, you know, clear up the record.

8 A second point with respect to, um, the
9 interlineations. I think I now understand where things,
10 um, have landed, but just to be clear. The
11 interlineations we're talking about, and I believe
12 Mr. Kanter was talking about, were ones made apparently
13 by Mr. Armstrong on the action memo, not by a lawyer.

14 THE COURT: I -- I never was under a
15 misapprehension as to that. The problem is we're being
16 cautious about documents, and he started off talking
17 about interlineations by Mr. Armstrong, I said, no, no,
18 no, and he moved to e-mails. We talked about e-mails, I
19 allowed him to expand now to interlineations, undisputed
20 apparently by Mr. Armstrong on this decision memo. And,
21 um, I've heard his argument. I'll hear yours.

22 MR. ABDO: Thank you.

23 And then a third point, your Honor, has to do with
24 the deliberative process privilege and connects to the
25 action memo that we were just talking about. As you'll

1 have seen from our filing, we don't think the
2 deliberative process privilege covers any of the
3 documents that have been turned over to plaintiffs for a
4 variety of reasons. We explained four in the memo. I
5 won't repeat them here. But let me just highlight two
6 of them.

7 One is that all of the documents we're talking
8 about have been adopted, including especially the action
9 memo that we were just talking about. Mr. Armstrong --
10 well I don't want to go into any details, but I think a
11 review of the document on its face makes clear that it
12 was adopted, and once a document is adopted as a
13 decision of the government, whatever predecisional and
14 deliberative character it had before that might have
15 justified invocation of the privilege falls away.

16 So, you know, we think it would be proper to
17 overrule all the government invocations for that reason.

18 THE COURT: There have been opinions of this Court
19 which, if you looked at the draft, which otherwise was
20 privileged, I -- I don't know as I'll use the word
21 "confess," the only changes I made were to avoid split
22 infinitives, which is an issue of mine, and to move a
23 few, um, commas. So that reveals that the draft, by the
24 law clerk, was 95 percent acceptable to the responsible
25 judicial officer when I signed my, um, my -- put my

1 signature on it.

2 I do not conceal from the bar that in the main,
3 um, I delegate to clerks and interns initial drafts.
4 Frequently I do rewrite or add sections and subtract,
5 and all of that business. But, um, it does add a little
6 more information if you were to know the last draft
7 before the judge put, in my case, his signature on it.
8 And I always thought that was privileged.

9 I think that's correct, your Honor, but two points
10 about that. One is that once you put your signature on
11 the document, then it is expressly adopted.

12 THE COURT: Exactly.

13 MR. ABDON: I don't think there's any debate in the
14 doctrine about that proposition.

15 And the second point is that, even with respect to
16 documents that were once predecisional and deliberative,
17 if they were incorporated by reference into the
18 decision, or relied upon, as many of these documents
19 were expressly in the decisional document, that
20 incorporation waives whatever deliberative process
21 privilege there would be.

22 So just to be very concrete. In the decisional
23 memos we have, in the certified administrative record,
24 you know the ones from the Secretary, those memos
25 expressly base their decision on underlying memoranda

1 setting out the factual understanding of the Department
2 of State or the Department of Homeland Security. They
3 quote them. They site them. They list them as
4 attachments. That incorporation also waives whatever
5 predecisional and deliberative character the underlying
6 memos might otherwise have had prior to the final
7 decision.

8 And we think that applies to the bulk of -- and
9 between those two arguments, we think it covers all of
10 the documents over which the government has asserted the
11 privilege.

12 THE COURT: And I'm saying it back to you now. At
13 some stage I will write an opinion here, and in legal
14 writing they'll be citations, and the citations will be
15 to the record, or to opinions and the like, all of which
16 -- and your point is, "If you do that, Judge, all of
17 those necessarily are public, because, in legal writing,
18 that is explication of what you relied on, it shows your
19 reasoning."

20 MR. ABDO: Precisely, that is the basis for your
21 decision. And the bases cannot be withheld under the
22 deliberative process privilege.

23 THE COURT: Okay.

24 MR. ABDO: One final point, your Honor, has to do
25 with our ability to cross-examine on the basis of these

1 documents. And to that I'd like to turn it over to
2 Ms. Conlon. If that's okay?

3 THE COURT: Of course it is.

4 MS. CONLON: I have a very extra-vested interest
5 because I am, as you know, have begun the cross-
6 examination of Mr. Armstrong.

7 So our friends on the other side make the point
8 that even if the documents couldn't be used by us in
9 terms of entered into evidence or shown to a witness,
10 that we wouldn't be hampered because we could ask
11 important, you know well-crafted questions.

12 THE COURT: He didn't say you wouldn't be
13 hampered, he says you can think of ways around it.

14 MS. CONLON: And I want to let the Court know some
15 important context that there's no reason the Court would
16 have known, which is this.

17 I sat in a room with Mr. Armstrong for a whole
18 day. He did not recall and could not answer a single
19 question about the basis for any of these decisions,
20 even the manner of these decisions, and he repeatedly
21 said, "Please show me the documents." I cannot tell you
22 how many times he asked me to show him the action memo
23 and the Watson letter, and of course I didn't have them
24 because, until the Court shared them with us, we had
25 never seen them. We could not effectively get at the

1 truth without them.

2 THE COURT: Wait. Now, um -- I'm going to cut you
3 off, Ms. Conlon, but only for this witness. My ask to
4 the Court of Appeals is that they lift their stay, um,
5 not really that they, um, dismiss -- and I don't know
6 that it properly is before me, that they dismiss the
7 petition, that's up to counsel arguing the several
8 positions.

9 But at their invitation, I am going to ask that
10 they lift the stay, and as I put it, "allow me to muddle
11 through to the end of the evidentiary process."
12 Mr. Kanter referred to it, and respectful to plaintiffs'
13 counsel, deservedly so. And I -- the counsel I have
14 here in the courtroom before me, I have genuine respect
15 for you all. We have worked cooperatively and I have
16 been able to make rulings that I have thought
17 prudential.

18 I'm talking to the -- I can't decide -- I'm having
19 this discussion. We have daily copy. You can transmit
20 it all to the Court of Appeals. But I can't -- I put on
21 the record that I'm ruling that the assertions of
22 attorney-client privilege are, um, overruled on the
23 basis of waiver, because they were put before the
24 factfinder.

25 I am ruling that the, um, claim of deliberative

1 privilege as to -- I want to reflect on what Mr. Abdo
2 said, but as to so much of the e-mails that actually
3 reflect attorney advice is sustained, so long as we are
4 clear, as Mr. Kanter has made it clear, that the Court
5 may look at those things, draw inferences and the like.
6 But I'm going to treat those as having sustained, um,
7 that on the deliberative process privilege.

8 Beyond that, I'm not making any rulings as to the
9 reach of the deliberative process privilege because the
10 process Mr. Kanter has described is, um, both acceptable
11 to the Court and workable. And if the Court of Appeals
12 will allow me to proceed with Mr. Armstrong and
13 Mr. Watson, um, I don't think there's any more I can
14 say. I've tried to be transparent to counsel and to the
15 Court of Appeals.

16 Yes?

17 MS. STROKUS: Your Honor, I just wanted to put on
18 the record before you that Ms. Conlon has
19 mischaracterized what occurred at Mr. Armstrong's
20 deposition. I was also there the entire day. And
21 plaintiffs repeatedly asked him to speculate on
22 documents that they could not produce to him. So he's
23 under oath --

24 THE COURT: Well because they --

25 MS. STROKUS: So he's under oath. It's important

1 that he tell them, "I'm not going to speculate on the
2 contents of these documents."

3 THE COURT: I'm not drawing any conclusions. If
4 the Court of Appeals will allow him to resume the stand,
5 I can handle the examination.

6 Now that --

7 Yes?

8 MS. CONLON: Your Honor, may I ask you a question?

9 THE COURT: Oh, of course you may. We're talking
10 now. And I'm fine with talking, but I can't -- I've
11 made the rulings I've made to try to be helpful, because
12 I have enough of a basis to make those rulings. Beyond
13 that, I'm asking that they let the trial go on, and a
14 trial is a trial.

15 MS. CONLON: And when your Honor said, "If the
16 trial is permitted to continue with examinations of
17 Mr. Armstrong and Mr. Watson, that we can use the
18 process we have used so far," which I understand --
19 that's the part I wanted to get clarification on. I
20 take that to mean to deal with things as they come up.

21 THE COURT: Yes.

22 MS. CONLON: Okay. We have discussed the action
23 memos today and we've discussed the e-mails, but we have
24 not discussed, unless I missed it, the letters from
25 Mr. Watson to the State Department. I wanted to make

1 sure that that's also something we're addressing today
2 to the extent that the Court is willing.

3 THE COURT: I am willing, because I consider them
4 core documents. And, um, maybe I should go back to
5 Mr. Kanter to be -- to see if, um, there's any ruling I
6 can make.

7 Mr. Kanter, as to the Watson letters?

8 MR. KANTER: Yes.

9 The Watson letters are referrals from one agency
10 to another, and, um, the government stands on the, um,
11 log entries as to those documents we submitted to the
12 Court.

13 THE COURT: Yeah, but they really are very fine
14 points.

15 MR. KANTER: (Laughs.) Fine?

16 THE COURT: What are your objections?

17 MR. KANTER: You're right, and I apologize for
18 that.

19 THE COURT: No, no, that's all right.

20 MR. KANTER: I strained to read them myself.

21 THE COURT: I have a magnifying glass.

22 MR. KANTER: Um -- okay.

23 In my recollection, the referral letters are
24 law-enforcement sensitive, they were the subject of a
25 motion to compel by the plaintiffs, which your Honor

1 denied. They were among the documents that your Honor
2 held the privilege had been waived.

3 We have not changed the assertions as to those
4 documents. They remain law-enforcement sensitive. Your
5 Honor handed them to plaintiffs with the AEO
6 stipulation. We, um, believe that is a compromise that
7 enables the trial to proceed.

8 THE COURT: Thank you. Yeah, I think that's
9 well-said.

10 MR. ABDO: Your Honor, if I may just add one note
11 with respect to those?

12 THE COURT: Yes, please.

13 MR. ABDO: You know those documents appear on the
14 chart that we provided to the Court last night. Among
15 the first, I think 9 or 10, all withheld only under the
16 law-enforcement privilege. And we understand your court
17 to have overruled that assertion of privilege with
18 respect to these documents based on your Court's
19 conclusion, which we fully agree with, that the
20 government had interpreted that privilege far too
21 broadly to cover not just information that was disclosed
22 with compromise and investigation, but the sort of
23 information we've seen from these memos, which is
24 largely factual information. And using techniques that
25 have already been disclosed to the public and described

1 in open court, mainly the collection of social media
2 information and the like.

3 So we think the Court has already ruled with
4 respect to those documents on the merits, not on the
5 basis of waiver, such that the First Circuit's order
6 doesn't even implicate our use of these documents at
7 trial.

8 THE COURT: Actually you've stated it better than
9 I. But the use of the word "waiver" there, by the
10 Court, was infelicitous, because while I went on to
11 explain my focus on the law-enforcement privilege and
12 explain what I believed was the scope of the
13 law-enforcement privilege and functionally overrule that
14 privilege as to these documents, as you have properly
15 said and more effectively described, the use of the word
16 "waiver" was infelicitous. And now that I've gone back
17 and looked at the transcript, I said, "You may submit
18 law-enforcement privileged data and I used words much
19 like "and I will honor it." And that's their basis for
20 saying, in effect, that they were snookered. They were
21 not snookered. That didn't estop the Court from making
22 a ruling on the privilege. I made the ruling on the
23 privilege. But they did not waive it by asserting it
24 and giving me the documents.

25 What they did was give me the documents, allow me

1 to rule on the privilege, I overruled it, and as a
2 matter of trial management, have decided, and persist in
3 that decision, that they may be used to get in the
4 trial. Everyone agrees I may look at them. But I think
5 that, um, I may look at them more effectively if I
6 permit cross-examination, which has been the Court's
7 reason and process for turning things over under the
8 stipulation of attorneys'-eyes only. Thank you.

9 MS. CONLON: Your Honor, I'm so sorry, may I ask
10 you a question?

11 THE COURT: Don't apologize. You know we're
12 talking.

13 Go ahead, Ms. Conlon.

14 MS. CONLON: Okay.

15 So understanding the Court's point that if we can
16 continue, we will use the process that we have used,
17 which is collaborative with the Court and the
18 government, the concern that I hope was clear in our
19 application for time is that that process takes time,
20 meaningful time, and I am deeply concerned that with
21 only several hours we will not be able to even finish
22 this process.

23 THE COURT: I'm sure you're concerned, but that
24 was clearly to be anticipated in a trial of this sort.
25 No additional time.

1 Now, um, there's one other document and we haven't
2 talked about it and I actually talked about it in trial,
3 but we haven't talked about it here. And I think my, um
4 -- I think, one, the document, as I understand it, is
5 not implicated in this application for a writ of
6 mandamus, and that is the single document marked A as to
7 which the government has asserted the Executive
8 Privilege. They call it the "Presidential Privilege,"
9 which has thrown me a little bit, but it's the same
10 thing as the "Executive Privilege," which I am somewhat
11 familiar.

12 As to that document, I have characterized it in
13 open court saying, "It appears to be peripherally
14 relevant." Here's how I'm going to handle that
15 document, if it hasn't been clear. And again all of
16 this I fact expect you to transmit to the Court of
17 Appeals should you take a position with respect to it or
18 have issue with it.

19 The Executive Privilege has not in any way been
20 waived, and has been asserted, and timely asserted. The
21 matter was and is under advisement by the Court without
22 respect to the, um -- without respect to the mandamus
23 proceedings.

24 It seems to me there are three possible outcomes.
25 The Court determines that the privilege applies. If

1 that happens, the document itself will be returned to
2 the government forthwith. But notification will be put
3 either by my saying so during the trial or if it's in
4 the under-advisement period, um, by notification on the
5 docket.

6 Second, that, um, the ruling, whether it applies,
7 um, is deferred by the Court until the, um, time I am
8 writing up the opinion and I decide that while relevant,
9 it's so peripheral that no mention of the document need
10 be made in the opinion, nor reference to it. If that
11 happens, the document at that point will be returned to
12 the government forthwith, physically, no copies retained
13 in the file of the Court at all. It's treated in our
14 procedures as a highly-sensitive document. I have
15 custody of it.

16 The third possibility is that the Court finds that
17 the privilege -- rules that the privilege does not
18 apply, and further, um, wants to cite. The second
19 option, I don't have to decide whether the privilege
20 applies, if I'm not going to cite it, I'll give it back,
21 because I'm not relying on it in any way. If I find
22 that the rule -- that the privilege does not apply, and
23 the -- and I'm going to cite it or use it, in that case
24 I will give notice, and then I would think that would be
25 ripe, um, and indeed -- why don't I say it right now, I

1 will not do anything for -- I will automatically, I'm
2 putting it on the record now, stay any further action as
3 to the document for 7 days so that the government may,
4 um, seek to protect the document.

5 I have said one thing that, on reflection, I want
6 to retract, and I'm looking for you, Mr. Kanter, who's
7 arguing these privileges. I suggested the possibility
8 that assertion of the privilege could be a basis, even
9 if it wasn't national security, for an adverse
10 inference. That's error. And I would not do that. And
11 the reason, on the record, is there is an institutional,
12 um, reason, wholly apart from this case, for the Office
13 of the President of the United States to assert the
14 Executive Privilege and vigorously to patrol its
15 parameters to preserve the Office of the President of
16 the United States, both as to Congress and the courts
17 and the public. That's established in the case law. I
18 fully respect it. And, um, the privilege asserted here,
19 I can readily conceive of reasons why the government, as
20 an institutional matter, would assert it, utterly
21 regardless of any issue laid before the Court.

22 So any adverse inference from asserting it is --
23 will be improper, and I assure you I would draw no such
24 inference. That's how I'm going to handle that. So
25 we're clear on that.

1 Now with that I think I -- let me tell you what I
2 plan to do. I plan to go back and talk to the law
3 clerk, um, we'll say a 20-minute recess. Then I'm going
4 to come back and I propose, really briefly, to --
5 subject to Mr. Abdo being heard here, to briefly, um,
6 accept the Court of Appeals invitation and to explain
7 myself on the record. Again, this is not a brief. I
8 will just explain how I -- if permitted, I will ask to
9 have the stay lifted, but the writ I take no position
10 on, the proceedings for the writ could depend, um, and
11 that will constitute my response. And I will, because
12 we've got daily copy, I will transmit a copy of my
13 remarks, soon to be made, to the Court of Appeals.

14 I do want to add, with thanks, the Chalk HN, it
15 really sort of walks through the -- what I've described
16 as the "Core" documents. And, um, I should append it to
17 my remarks and I'll see that that's done. So I'll ask
18 you to wait for that because I think it will be helpful
19 for you to, um -- my whole reason for doing it this way
20 is for you to hear it.

21 And, Mr. Abdo.

22 MR. ABD0: Thank you, your Honor, just one brief
23 point.

24 We obviously don't have Exhibit A, the document
25 for which the government has asserted the Executive

1 Privilege or the Presidential Communications Privilege.
2 Just one note about that document, if the Court
3 determines it is relevant and is weighing the question
4 of whether it is properly privileged.

5 One of the key elements of the Presidential
6 Communications Privilege is that the information in the
7 document at issue not have been distributed beyond the
8 President's close advisors involved in the
9 decision-making at issue. Mr. Lapowski's declaration
10 which asserted the privilege does not address the
11 distribution of this document. And so it is our
12 position that the government has not yet met its burden
13 of invoking that privilege. We obviously have no basis
14 to know the distribution of the document, but it's our
15 position that they have yet to satisfy that element of
16 the burden. And so we'd ask them, at the very least, to
17 supplement their filing in that regard.

18 THE COURT: Thank you.

19 I thank you all. We'll take a recess for 20
20 minutes and, um, the Clerk will advise you as to what
21 will next happen. But I'm hopeful to come back and
22 briefly accept the invitation of the Court of Appeals
23 and, um, so that you may all support or take issue with
24 it and the like.

25 And with that done, I think that would, um,

1 conclude the proceedings for today. Because when I'm
2 done, I'm going to recess. So let me go around.

3 Is there anything else that you think we ought be
4 discussing today? I've told you what I'm going to ask
5 for.

6 (Silence.)

7 MS. CONLON: Um, to make sure we understand we're
8 proceeding tomorrow. If there is no ruling from the
9 First Circuit with respect to the, um --

10 THE COURT: If there is no ruling, then, um, I
11 understand the boundaries of the stay and I will
12 scrupulously adhere to them.

13 MS. CONLON: And to make sure that I understand
14 that same understanding, when we are questioning the ICE
15 agent tomorrow, so that we don't run afoul of anything
16 here, um, if there is no ruling from the Court of
17 Appeals, are we permitted to ask questions that rely
18 upon information that we know from those documents?

19 THE COURT: It depends upon how you ask them.

20 MS. CONLON: Okay.

21 THE COURT: I don't, in any way, mean to be coy.
22 We can't unring the bell. For good and sufficient
23 reason, I have turned the documents over to you because
24 candidly I wanted them, um, to subject them to cross-
25 examination so that I could better understand the full

1 context. That's where we are in this case.

2 MS. CONLON: A related question, your Honor.

3 These documents, in particular the Watson letters
4 and the action memos, does the Court understand and
5 review them as part of the record that's in evidence
6 that the Court may consider in reaching its findings or
7 are these from the Court's perspective outside of the --

8 THE COURT: No, the Court -- that I think I made
9 clear, and I don't think the government has an objection
10 to that.

11 I take these documents, with the exception of
12 attorney, um, volunteering of, um, or giving -- I
13 shouldn't say "volunteering," giving legal advice, as to
14 which I am prepared to exclude as part of the
15 deliberative process, I'm not saying the whole e-mails,
16 um, and I'm going to put that to one side.

17 MS. CONLON: Okay.

18 THE COURT: Having said that, everything else --
19 and I don't hear defense counsel objecting to it,
20 unredacted, is part of the record on which -- except
21 perhaps for this Executive document as to which
22 Executive Privileges -- well let me start again.

23 As to the core documents -- I'm speaking to the
24 core documents. As to the core documents, I can look
25 and rely upon them all, with the one exception that I've

1 just now stated in open court. As to the document as to
2 which Executive Privilege is asserted, I've told you how
3 I'll handle that.

4 As to the other documents, if there are more, um,
5 I take the position -- we haven't discussed it here
6 today, but I take the position that the privileges that
7 I have allowed now to be asserted are asserted with
8 respect to those documents, and I will rule upon them.
9 Rather broadly I have, um, overruled the assertion of
10 the attorney-client privilege. I intend to sort through
11 them, in the deliberative process, post-trial and, um --
12 it's a benal phrase, "Let the chips fall where they
13 may." If I accept the privilege, I won't rely on it.
14 If I don't, I will. And it should be clear.

15 Has that answered your question? That is a good
16 question. And that's what I intend to do.

17 MS. CONLON: Nearly. Nearly. I think I nearly
18 have an understanding.

19 A concern, your Honor, or a related question, is,
20 um, if we spend time of our remaining time questioning
21 witnesses about the content of certain documents -- and
22 I'll call them the "core documents," forgetting the
23 e-mails, putting aside the e-mails, the "core
24 documents," being the Watson letters and the action
25 memos. If we spend time questioning witnesses on them

1 and the Court later concludes those materials are under
2 some sort of a privilege and therefore the Court can't
3 rely on them or use them, you can see how it puts us --
4 all of us, I think, in a difficult position if we've
5 elicited all of this testimony --

6 THE COURT: We're all in a difficult position.

7 MS. CONLON: You too, of course. And in
8 particular, because the Court knows I'm quite focused on
9 this time issue, it puts us in the hard position of
10 potentially having used all our time on stuff that I
11 think the Court can't even consider. And so --

12 THE COURT: No, what I've heard from them, I can
13 consider them. I'm going to consider them, the core
14 documents. I'm going to consider them all. Whatever
15 your cross-examination, I'm going to consider them.
16 With the exception of what attorneys may have advised --
17 may have advised, but as we've said in open court, those
18 were logical questions which I was asking before I'd
19 even looked at the documents. But I am permitted, they
20 are part of the record on which the Court will make its
21 decision. Part of the record. If I cite them, implicit
22 in that is I've overruled any privilege of any sort.

23 MS. CONLON: And the Court will likewise consider
24 testimony from witnesses about those documents?

25 THE COURT: Of course.

1 MS. CONLON: Okay.

2 THE COURT: Well I don't understand -- well the
3 Court of Appeals can instruct me as it wishes. I would
4 be -- look, I'd be very surprised. The Court of
5 Appeals, because I've made clear to the government I'm
6 going to -- with one exception, I am going to look at
7 the core documents. If the Court of Appeals were to
8 instruct me otherwise, I would have seriously to -- to
9 strike some or most or, um, but a significant part of
10 the core documents, if I have made such a mistake, I
11 would seriously have to consider recusal. Because if
12 this -- then if this case comes out and plaintiffs lose,
13 the integrity of the Court's factfinding will always be
14 suspect, truly suspect, that if only I had considered
15 those things, you would win.

16 Contrary-wise, if I were to find these high,
17 significant, the President of the United States, among
18 others, liable for infringing core constitutional rights
19 on such a truncated record, it will always be believed
20 that this Court didn't put it aside, as I've asserted,
21 all the attorney stuff I could put aside. I was asking
22 those questions. And I'm not going to be put in that
23 position. I should recuse and we'll start over in
24 accordance with the, um, decisions of the Court of
25 Appeals, which of course I will follow scrupulously.

1 So if I've made that mistake, um, I'd seriously
2 considering recusal. But I don't hear anyone saying
3 that. Now maybe I'm mistaken.

4 MS. CONLON: No, your Honor.

5 THE COURT: Yes? Mr. Kanellis, before I take the
6 recess.

7 MR. KANELLIS: Just briefly, your Honor. That
8 instruction we will plan on presenting four witnesses
9 tomorrow, one of them testifying from London.

10 THE COURT: Oh, he was the one from London. And
11 that's fine, that's worked well.

12 MR. KANELLIS: Thank you, sir.

13 THE COURT: All right. 20 minutes, we'll recess.
14 Thank you.

15 THE CLERK: All rise.

16 (Recess, 10:25 a.m.)

17 (Resumed, 10:55 a.m.)

18 THE COURT: The Court takes this opportunity, on
19 the record, in the presence -- in open court, in the
20 presence of counsel, to accept gratefully the invitation
21 of the Court of Appeals to address the, um, mandamus
22 petition both generally and expressly to address the
23 issue of waiver with respect to that petition.

24 I'm going to start by, um, making a request to the
25 Court of Appeals. I'm not going to argue in any way the

1 substance of the petition. That's for the parties. The
2 Court's conduct is all a matter of record. And the
3 transcript governs and is more, um, important than
4 anything I say now. But I'm going to start with the
5 request, simply as a matter of case management, that I
6 would make of the Court of Appeals. And it is this.

7 I request the Court of Appeals to lift the stay,
8 though I express no opinion on the disposition of the
9 petition for mandamus, and it might well, um -- it's
10 entirely up to the Court of Appeals, it might well make
11 sense to let the petition survive so that it may have
12 the benefit of further proceedings in this court.

13 But I would ask the Court of Appeals to lift the
14 stay so that the evidentiary portion of this first phase
15 of this jury-waived trial might complete.

16 We are in the, um, second week of a two-week --
17 9-day trial, and once that trial is over, or the
18 evidentiary portion is over, it's appropriate for this
19 Court to sketch what I anticipate will be the necessary
20 further proceedings.

21 This is a case -- and I know the Court of Appeals
22 appreciates this, but this is a case where intent and
23 motive play a significant role, and once the evidence is
24 fully before the Court, it's the Court's intention to
25 take the matter under advisement. This is not a case

1 where even as to a portion of the case the Court expects
2 that, because of the evidence, to be in a position to
3 make any ruling from the bench, rather the Court expects
4 to take the case under advisement, seek, um, requested
5 findings and rulings from all parties, carefully review
6 the record, and then issue a full written opinion.

7 The actual likelihood of that opinion emerging
8 before September is unlikely. So the urgency to fully
9 decide the, um, petition is, um, not grave. Given the
10 fact that what's done is done, the plaintiffs have
11 access to the material which the Court deemed
12 appropriate to subject to cross-examination during the
13 trial, and I adhere to that decision and expect to
14 adhere to it, subject to a proper, um, a claim of
15 privilege during the course of the remaining
16 proceedings. And I'll speak to that in a moment.

17 And one can anticipate, of course, that as this is
18 only the first phase of this case, if the case were to
19 resolve in favor of the defendant public officials, then
20 of course the plaintiffs would have the right to a
21 plenary appeal. Contrary-wise, if the case were, at
22 least on what I'll call the "liability phase," resolved
23 against one or more, and I treat them separately, of the
24 defendant public officials, um, that would afford an
25 opinion -- that would afford a place for an

1 interlocutory appeal, should the Court of Appeals wish
2 to evaluate the propriety of that decision while this
3 Court wrestled with the very real problem, even if
4 that's how it were to play out, of redressability,
5 something this Court has not addressed in the -- its
6 hearings thus far. So that's the Court's approach to
7 the management of this case.

8 Let me then, without arguing the point, um,
9 explain the Court's position with respect to matters to
10 be considered on the petition for mandamus. And I think
11 it's important to understand that the Court, and I
12 believe the parties, place the documents in question,
13 because at bottom, this is an issue over evidentiary
14 rulings mid trial as to certain documents produced.

15 I separate the documents into three buckets. What
16 I've called the "core documents," these documents are
17 documents that evidence the transmission of materials
18 about certain target subjects, which I've required the
19 plaintiffs to designate, which they are arguing are
20 exemplars of their so-called "ideological deportation
21 policy." The Court of Appeals will understand that the
22 defense asserts there is no such policy and that the
23 proceedings of the government agencies were lawful in
24 every relevant part.

25 So the core documents are the "ROAs," so-called,

1 and transmittal letters, um, e-mails commenting thereon,
2 that were transmitted from the Department of Homeland
3 Security to the Department of State, specifically to the
4 Bureau of Consular Affairs, and certain of those, the
5 transmittal letters that so transmitted them, and, um,
6 thereafter the "decision memos," so-called by this
7 Court, that the Director of the Bureau of Consular
8 Affairs transmitted most, but not all, of the packet to
9 the Secretary of State for decision, as required under
10 the law.

11 The actual interplay is -- and the standard
12 procedure is best illustrated in a chalk that the Court
13 has marked HN, and will attach to the cover letter sent
14 to the Court of Appeals, which, um, so far as this Court
15 can see, accurately describes the standing procedure of
16 both executive departments in handling matters. It of
17 course does not answer the key question which concerns
18 the content of the materials so transmitted. So those
19 core materials are the materials that I understand the
20 petition to center upon, and I'll come back to them.

21 There are two other packets of materials that I
22 transmitted in bulk to the Court all together, but I've
23 broken them out for this discussion. As to one
24 document, which I'll call Exhibit A, the government has
25 properly, and the Court recognizes the proper --

1 "proper" in the sense that I recognize that it's been
2 properly asserted and not waived, the government has
3 asserted an Executive Privilege. That's a, in this
4 Court's eyes, a difficult issue and one the Court has
5 not resolved and which the Court understands it is free
6 to resolve as the case goes on. So it's appropriate to
7 indicate to the Court of Appeals what I've told the
8 parties about how it will be resolved.

9 It seems to this Court that there are three
10 possible resolutions. First, that the Court resolves
11 that the specific document in question is subject to an
12 Executive Privilege. If it is, whenever the Court makes
13 that determination, it physically forthwith will return
14 the document to defense counsel and make a notation on
15 the record.

16 The second possibility is that, without deciding
17 whether the document is, um, subject to an Executive
18 Privilege, the Court, as it comes to analyze the case --
19 I've read the document and I largely understand it, um,
20 it makes no difference to the decision and the Court
21 needs not cite it. If that is, um, decided, the Court
22 will immediately return it to the defense counsel and
23 again make a notation on the record.

24 The third possibility is that the Court, um,
25 rejects, overrules the assertion of an Executive

1 Privilege and also decides that the document, which the
2 Court has thus far characterized as "peripherally
3 relevant," is in fact relevant to some conclusion the
4 Court determines to make. In that case, if the -- if
5 this present petition were, um, still pending, a dispute
6 over this document might be beholden to that petition.
7 And I've told counsel, if I make that decision, I will
8 stay it for 7 days so that they may take action with
9 respect to that document.

10 The third packet of documents are documents as to
11 which I have now allowed privileges to be asserted, and
12 they have been, but which will not figure in the, um,
13 oral testimony as no further documents are going to be
14 produced to the plaintiff -- the plaintiffs by the
15 Court, but which all parties agree the Court may look
16 at, determine privileges, as it goes forward, and I
17 shall do so.

18 Again, if I decide to rely upon and cite a
19 document, implicitly or explicitly, it will be clear
20 that I have overruled the privilege. If I don't cite
21 the document, it, um -- no ruling is necessary and those
22 documents no longer figure in the case.

23 The written -- were a decision on the petition of
24 mandamus -- for mandamus to await either appeal or allow
25 an interlocutory appeal, again that could all be

1 reviewed in the ordinary course, and evidentiary error
2 will be reviewed, and of course it is, as to whether it
3 makes a substantial difference in the outcome. And I
4 would have the liberty of, on a full record, to make the
5 findings and rulings that, um, I believe either have or
6 have not been proved by a fair preponderance of the
7 evidence.

8 So let me conclude simply by focusing on the core
9 documents and reiterate -- which do seem central to the
10 issues raised by the petition for mandamus, and, um,
11 respond directly to the Court's use of the word
12 "waiver," which the invitation expressly sought the
13 Court's further explanation.

14 The use of the word "waiver," upon reflection, was
15 infelicitous, so, um, it caused no prejudice to anyone,
16 because the Court followed it up with an explanation.
17 Here is the Court's view of what has happened.

18 The -- during a discussion on the plaintiffs'
19 motion to compel certain documents for, um, which the
20 plaintiffs claim were part of the record of decision of
21 its so-called "ideological deportation policy," the
22 Court declined to, um -- the Court denied the
23 plaintiffs' motion. But did say -- and again the
24 transcript of what I actually said at the time governs,
25 but I'll characterize it, said, "But I would receive

1 documents as to which the law-enforcement privilege was
2 asserted and I would honor it."

3 Now again the transcript governs. What happened
4 happened, was that ultimately over 300 documents were
5 submitted to the Court where the defense asserted not
6 only the law-enforcement privilege, but various
7 privileges, and, um, took, with respect to -- when you
8 look at these documents, a very aggressive, um,
9 position. The Court's -- the Court's review of the
10 documents became more, um, thorough as trial approached
11 and as the acting trial became to the front burner and
12 trial commenced, and the Court, as to these core
13 documents, um, came to the conclusion that the
14 law-enforcement privilege was inapplicable and was
15 asserted extraordinarily overbroadly. The Court
16 therefore was in a quandary.

17 Should, having overruled the -- that privilege,
18 should the documents be disclosed to the defense? And
19 the Court determined, to have the fairest possible
20 trial, that such disclosure was in the interests of
21 justice, and I did disclose it. Disclose them.

22 Various minor issues with respect to the -- I
23 shouldn't call them "minor," but with respect to
24 those -- to that disclosure have been worked out, I
25 believe, to the satisfaction of the parties. The

1 documents in their raw form I anticipated and expected
2 redaction of e-mails and telephone numbers. The defense
3 wants more. The, um -- there was indeed one reference
4 to something that, in all fairness, in fact bore on the
5 law-enforcement privilege, despite the Court's ruling.
6 That was corrected by full cooperation between all
7 parties, and the proper redaction made.

8 I say the use of the word "waiver" was
9 infelicitous because the Court did ask the defense to
10 submit the documents with respect to which it claimed a
11 law-enforcement privilege. The government now says that
12 they were -- they don't say this expressly, but their
13 position is they were snookered, and I got the documents
14 just to disclose them. Well that's not so. I certainly
15 never conceived that anything I said could be thought to
16 estop the Court from making proper rulings with respect
17 to the documents. And again, the transcript will
18 govern. But it's the Court's position that proper
19 rulings have been made.

20 One last point which, um, I state again simply to
21 be of assistance to the Court of Appeals. Today the
22 parties and the Court have had a very productive
23 discussion, the full transcript is of course available
24 to the Court of Appeals, and I recite only
25 determinations that I believe I am still authorized to

1 make with respect to these core documents. And I have
2 made the following.

3 Actually I've made the following with respect to
4 the assertion of the attorney-client privilege. Having
5 reviewed the documents and the arguments, I do rule that
6 the attorney-client privilege has been waived. It
7 simply is inapplicable in a situation where counsel has
8 provided documents to the factfinder, um, on the theory
9 that these documents are relative -- are relevant to the
10 decision, as certainly the core documents are. That
11 constitutes a waiver of the attorney-client privilege,
12 and the Court, less there be any doubt about it, so
13 rules.

14 In one respect the Court sustains the, um, claim
15 of deliberative process privilege and I have sustained
16 it as to, um, certain provision of legal advice by
17 attorneys in certain e-mails that form a portion of the
18 core documents. Beyond that sustaining, after
19 discussion with counsel, I make no further rulings as to
20 the deliberative process privilege, or any other
21 privilege, as to the core documents. And, um, I won't
22 say it's by agreement, but we've worked out that if
23 permitted to continue the trial, I will make what the
24 Court considers appropriate rulings on a
25 question-by-question basis.

1 Essentially the issues relate to the Director of
2 the Bureau of Consular Affairs, Mr. Armstrong, whose
3 testimony had just commenced cross-examination when the
4 stay, um, was transmitted, and a Mr. Watson, who wrote,
5 um, the transmittal letters from the Department of
6 Homeland Security to the State Department.

7 One other thing is significant and I will state
8 it. I understand that whatever ruling the Court makes
9 as to cross-examination in the course of the trial, the
10 Court is empowered, without objection by the government,
11 to review all the records in its possession, make proper
12 privilege rulings, and rely upon those which it rules
13 the privilege or qualified privilege does not apply.

14 With those explanations, which I truly hope are
15 helpful, the Court will respectfully submit this
16 transcript, just as soon as I get my hands on it, to the
17 Court of Appeals, respectfully and with appreciation for
18 being given the opportunity to comment on these
19 proceedings.

20 All right. So much for reporting to the Court of
21 Appeals.

22 Is there anything else we should discuss before
23 tomorrow at 9:00?

24 MR. ABDO: No, your Honor.

25 THE COURT: The defense?

1 MR. KANELIS: No, your Honor.

2 THE COURT: Thank you.

3 All right, 9:00 tomorrow morning. It's good to
4 see you all.

5 We'll recess.

6 (Adjourned, 11:20 a.m.)

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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER, do hereby certify that the forgoing transcript of the record is a true and accurate transcription of my stenographic notes, before Judge William G. Young, on Monday, July 14, 2025, to the best of my skill and ability.

/s/ Richard H. Romanow 07-14-25

RICHARD H. ROMANOW Date